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November 3, 2010

VIA ECFS

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

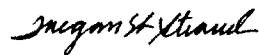
Re: Sandwich Isles Communications, Inc., Petition for Declaratory Ruling, WC
Docket No. 09-133

Dear Ms. Dortch:

On October 29, 2010, Sandwich Isles Communications, Inc. ("SIC") filed a petition for reconsideration in the above-referenced proceeding ("Petition"), requesting confidentiality of the entire Petition due to its reliance on documentation proprietary to the National Exchange Carrier Association ("NECA")-- the "Spare Fiber C&WF Investment Cost Reporting Guidelines" (the "Guidelines"). Today, NECA filed a letter in this proceeding waiving confidentiality of the Guidelines.¹ In light of this waiver, SIC hereby submits a public version of the Petition, which has been redacted pursuant to the protective order in this proceeding.

Should you have any questions, or require further information, please do not hesitate to contact the undersigned.

Respectfully submitted,



Megan E.L. Strand
Counsel to Sandwich Isles Communications, Inc.

Enclosure

cc: Pamela Arluk, Esq.
Gregory Vogt, Esq.
Suzanne Yelen, Esq.
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¹ See Letter from Gregory Vogt, counsel to NECA, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-133 (Nov. 3, 2010).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	WC Docket No. 09-133
Petition for Declaratory Ruling)	

To: Chief, Wireline Competition Bureau

**SANDWICH ISLES COMMUNICATIONS, INC.
PETITION FOR RECONSIDERATION**

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Summary of Argument

The Dispute. SIC's network costs have been placed in the National Exchange Carrier Association's ("NECA") traffic sensitive pool ("NECA Pool") by NECA without incident since SIC's inception. That changed in May 2009 when NECA advised SIC that that it challenged the prudence of the interisland undersea cable, which is part of the Paniolo cable network ("Paniolo"), concluding that "it *does not appear* to meet the standards of the '*used and useful*' doctrine." Petition at 3. NECA has never identified specifically what it is about the inter-island undersea cable that violates the NECA Pool rules, or why only the undersea segment of SIC's network (and not the terrestrial portion) must not go into the NECA Pool. What NECA has said is that there seems to be a lot fiber on the Paniolo undersea cable and that, as a result, the FCC should examine whether it is equitable for SIC's Paniolo costs to be put in the NECA Pool. (The Paniolo undersea cable has the same number of fiber as all the rest of SIC's network, which makes the proposition odd, at best.)

Against this vague backdrop of insinuation, SIC has struggled to persuade NECA and the FCC of several very simple things. First, that the network that SIC has built (including Paniolo) is precisely the network that it planned a decade ago and which RUS engineers concluded constituted a reasonable network. Second, that the FCC has already weighed legal and equitable arguments against putting SIC's network costs in the NECA Pool, and concluded that, on balance, the public interest allows those admittedly high costs in the NECA Pool. And third, that NECA is permitting all other Local Exchange Carriers ("LECs") to install fiber, including spare fiber, and put all costs in the NECA Pool.

NECA Withheld Critical Information About What Standard It Applies Industry-Wide (and Why It Proposes to Apply a Different Standard to SIC). NECA has never specified a standard that SIC has allegedly failed to meet. The reason why is now apparent.

There is in fact a legal standard governing how LECs are to treat excess fiber costs vis-à-vis the NECA Pool. The "Spare Fiber C&WF Investment Cost Reporting Guidelines" ("Guidelines") were created by NECA, are based upon FCC rules, and not available in public databases (so not susceptible to public research). NECA's failure to advise the Commission of the Guidelines as controlling authority cannot be accident.

Under the Guidelines SIC is Clearly Entitled to Recover 100 Percent of Its Paniolo Costs and Certainly 100 Percent of Its Terrestrial Fiber Costs. In the Guidelines NECA acknowledges that carriers typically maintain substantial spare fiber. The Guidelines cite an FCC Order concluding that on average 68 percent of all fiber is spare. As a result, NECA has developed a very simple system for dealing with how spare fiber has to be treated in the NECA Pool. If spare fiber is associated with in-use fiber and not held in reserve, the cost of spare fiber is to be allocated, and therefore recovered, in the same manner as the in-use fiber with which it is associated. For SIC that means it is entitled to 100 percent recovery of Paniolo fiber.

NECA's primary assertion in this case is that "ratepayers should not have to pay rates today that recover costs for equipment that will not be used for years to come."¹ In fact, the Guidelines, developed after the "used and useful" doctrine was last used, state exactly the opposite– that the economics of fiber are such that carriers "tend to have large[] amounts of spare capacity." Thus, the **Guidelines are inconsistent with NECA's application of "used and useful."** Yet NECA has argued that the doctrine (and implicitly not the Guidelines) should apply to SIC and limit what Paniolo costs should be recovered from the NECA Pool. It was legal error for the Order to not follow the Guidelines.

¹ Comments of the National Exchange Carrier Association, WC Docket 09-133 (Aug. 31, 2009) at 14 ("NECA Comments").

The Guidelines, which are based on the Commission's rules, do not distinguish between undersea and terrestrial fiber. In fact, both undersea and terrestrial fiber serves the same function for SIC transport, and that some fiber is undersea is merely a matter of geography. To the extent that the Bureau finds some basis to treat undersea fiber differently for NECA cost accounting, then SIC notes that the record shows that 55 percent of the Paniolo costs were for construction of terrestrial fiber. The 48 fiber Paniolo terrestrial fiber is no different than the 48 fiber terrestrial fiber of SIC and many other carriers, the costs of which have been accepted by NECA. The Order erred in failing to require NECA to accept 100 percent of the Paniolo terrestrial fiber costs.

In the Study Area Waiver Decisions the Bureau Previously Decided the NECA Cost Accounting Issues at Issue in this Case and Weighed The Same Equitable Considerations and Came to a Different Conclusion. The Order improperly ignored that there is direct and binding precedent by the Bureau which permits SIC to participate in the NECA tariffs and pools according to the same rules and regulations that apply to all other NECA Pool carriers. The Order dismisses the Study Area Waiver decisions as mere policy statements, but those decisions entertained the same legal and equitable issues as did the Order, and came to a different conclusion than the Order. The Order was obligated to follow binding precedent or, in the alternative, to identify a rational and compelling basis for departing from precedent. The Order is unjust because it deprives SIC of 50 percent cost recovery, places SIC at serious risk of default on the Paniolo lease and RUS loans, and jeopardizes the viability of SIC and its telecommunications service to the Hawaiian Homelands ("HHL"), all without legal justification.

The "Used and Useful" Equitable Doctrine Does Not Apply, but Even If Applied Correctly Would Provide SIC with 100 Percent Recovery. SIC has sought to persuade the FCC (and NECA) that it is not right to invoke the "used and useful" doctrine to evaluate the question of whether SIC's Paniolo costs should go into the NECA Pool. The doctrine is old,

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largely unused, and has never been applied to fiber. SIC argued generally that it does not appear that NECA has applied the used and useful" standard to any other small or rural LEC deploying fiber, and there are no cases or articles suggesting that NECA has ever done so. In view of the Guidelines it is now certain that "used and useful" is not the standard that NECA has applied to all of its other members or should apply in this case.

Even if the used and useful standard were applicable, it was misapplied here. The Order awards SIC \$1.9 million for in-use fiber, contrary to the Bureau's finding that the in-use fiber represents 98 percent of the Paniolo construction cost. The Order awards SIC only 50 percent of the remaining spare fiber, purportedly on equitable grounds. However, the Order is plainly inequitable and unjust and the 50 percent recovery analysis is not rational.

* * * * *

SANDWICH ISLES COMMUNICATIONS, INC.
PETITION FOR RECONSIDERATION

Sandwich Isles Communications, Inc. ("SIC") hereby seeks reconsideration of the Wireline Competition Bureau's ("Bureau")² recent Declaratory Ruling ("Order") in the above-captioned proceeding.³

NECA misled the Bureau by failing to advise the Commission that it has spare fiber rules which apply to all rural LECs participating in the NECA Pool. As a result, it appears the Bureau felt obligated to undertake, in a factual and policy vacuum, an analysis of whether it is prudent to allow SIC to recover the costs of Paniolo "spare" fiber.⁴ As it turns out, the existence of spare fiber is so common that NECA has a rule governing it. That rule clearly applies to spare Paniolo fiber and application of that rule clearly provides that SIC is entitled to recover 100 percent of its spare fiber costs from the NECA Pool. As a result, the Bureau must: (a) reconsider the cost recovery methodology adopted in the Order; and (b) award SIC 100 percent cost recovery.

No basis exists to treat undersea fiber differently than terrestrial fiber.⁵ However, to the extent that the Bureau finds some basis to distinguish undersea fiber, the Bureau must find that 55 percent of the Paniolo costs relate to the terrestrial fiber. Accordingly, the Bureau must award 100 percent recovery for terrestrial portions of the Paniolo cable network because that fiber is exactly the same as all other fiber on the SIC network, all of which has been placed in the NECA

² As in the Order, the term "Bureau" refers to the Common Carrier Bureau prior to reorganization, and to the present Wireline Competition Bureau.

³ *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133 (Sept. 29, 2010) ("Order").

⁴ The Order identifies "spare capacity" as the legal issue in this case. *See* Order at ¶¶ 21 and 22. Factually, the Order notes that the Paniolo cable network "consists of four (4) Undersea Components and six (6) Overland [terrestrial] Components, including but not limited to beach landings, terminal buildings and central office electronics." Order at n.16.

⁵ Section 36.153(a) states that "cable consists of: Aerial cable, underground cable, buried cable, submarine cable, deep sea cable, and intrabuilding cable." 47 C.F.R. §36.153(a).

Pool without dispute. Lastly, the existence of the Guidelines raises a question of whether NECA has lacked candor in this proceeding by failing to advise the Commission of its Guidelines.

I. NECA's Spare Fiber Rule Applies to this Case

NECA has rules for cost allocation and cost recovery for spare fiber. Those rules require NECA to accept into the NECA Pool the cost of the spare Paniolo fiber. Instead of following the Guidelines, NECA has sought to convince the Bureau that spare fiber is some new challenge and that the Bureau should therefore apply the "used and useful" equitable doctrine to create new rules applicable only to SIC ("the Paniolo Spare Fiber Rule"). No legal or factual basis exists to depart from the spare fiber Guidelines that has governed all other rural LECs who participate in the NECA Pool. Thus, application of a new rule only to SIC is arbitrary and capricious, violates due process, and violates rulemaking requirements of the Administrative Procedure Act.

A. NECA Has Spare Fiber Guidelines that Apply to Paniolo Spare Fiber

Since at least 2004, NECA has had in place a cost allocation and recovery rule that applies to spare fiber. A copy of the Guidelines is appended to the Declaration of Ben Harper of GVNW Consulting, Inc. ("Harper Declaration"), which is Exhibit A. The Guidelines are based upon the FCC's Part 36 (jurisdictional separation) rules. Where a fiber cable is in use, the Guidelines require carriers to allocate the cost of spare fiber in the same manner that in-use fiber is allocated.

The Guidelines provide a simple illustration: A carrier deploys 24 fibers, of which 8 are in-use and 16 are spare. The cost allocation of the 8 in-use fibers is to be applied to the spare fibers. Thus, if the 8 in-use fibers are dedicated solely to regulated service *the cost of the 8 used*

*fibers and the 16 spare fibers are to be recovered from the NECA Pool.*⁶ There is no dispute that Paniolo includes both in-use and spare fibers, and the Harper Declaration advises that all of Paniolo's traffic is regulated traffic. Therefore, this cost allocation method should have been applied to Paniolo.

The Harper Declaration explains that [REDACTED] in-use fibers are being used for regulated services and are allocated to the NECA Pool. Thus, following the Guidelines that apply to all rural LECs, the cost of Paniolo spare fibers is required to be allocated to the NECA Pool. The Harper Declaration states that Mr. Harper is unaware of any instances, other than this case, in which NECA has refused to follow its Guidelines. Therefore, according to NECA's own rules, SIC is entitled to 100 percent recovery from the NECA Pool of the costs of Paniolo spare fiber. In addition, the Order fails to follow NECA accounting rules with regard to necessary non-lease costs (such as insurance, maintenance and engineering). The Order should be corrected on reconsideration to conform to NECA accounting rules with regard to those costs, as set forth in the Harper Declaration.

B. The FCC Has Found that Carriers Deploy Twice as Much Spare Fiber as In-Use Fiber

The Harper Declaration explains that fiber has a useful life of 20-25 years, and carriers lay sufficient fiber to meet demand during this time period. A substantial amount of the cost of laying fiber is in the engineering and construction process.

Indeed, the FCC has found that on average, *68 percent of all fiber is spare.*⁷ To avoid doubt, we liberally quote the *Jurisdictional Separations Reform Notice of Proposed Rulemaking*,

⁶ Guidelines at 1-2.

⁷ *In the Matter of Separations Reform*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22153, ¶ 70 (Oct. 7, 1997) ("Separations NPRM").

which addressed the apportionment procedure used for distributing the costs of spare network facilities among categories. The Commission noted:

Our separations rules generally require carriers to apportion the cost of such facilities among categories on the basis of working network facilities... As telecommunications networks evolve to provide more high-capacity services over fiber cables, however, *the deployment of spare facilities appears to be increasing. Indeed, ILECs have deployed approximately twice as much spare fiber as they have working fiber*... a significant portion of both fiber and copper loops and interoffice trunks represent spare facilities, and the costs associated with those facilities are substantial. According to the most recent ARMIS data, large *ILECs have a total of \$ 125 billion invested in C&WF, with a significant percentage of that investment associated with spare facilities: 68 percent for fiber and 30 percent for copper loops.*⁸

These findings are based on reports from carriers that include "95 percent of the industry's access lines."⁹

It also appears that in failing to identify the Guidelines NECA may have lacked candor. To the best of SIC's knowledge NECA did not identify the existence of the Guidelines in its filings¹⁰ or any of nine *ex parte* meetings with the Bureau, even where the stated purpose of the meeting was to educate the Commission about NECA's pooling processes.¹¹

⁸ *Id.* (internal citations omitted).

⁹ *Separations NPRM* at n.130.

¹⁰ See generally NECA Comments; see also Reply Comments of the National Exchange Carrier Association, WC Docket No. 09-133 (Sept. 10, 2009).

¹¹ "NECA requested any order provide clear direction with respect to all cost recovery issues [and] also discussed its tariff and pooling processes." Letter from Joe Douglas, Vice President Government Relations, NECA, to Marlene Dortch, Secretary, FCC, WC Docket No. 09-133 (Sept. 21, 2010).

C. No Legal Basis Exists to Apply Anything Other than the Guidelines to Paniolo Spare Fiber; the *Comsat* and *PSV Cable* Decisions Support 100 Percent Recovery by SIC, Not 50 Percent Recovery

As a result of the Guidelines not being introduced in this case, the Bureau relied upon two cases that well precede the Guidelines, the *PSV Cable* case and the *Comsat* case. Both cases, properly read, support the award of 100 percent cost recovery to SIC. Neither case contains any support for the 50 percent cost recovery in the Order.

PSV Cable Cases. There were two PSV cable cases. They are unique cases decided on separate facts, and the latter does not overturn the former. The first case awarded 100 percent recovery while the second awarded 50 percent recovery. The first case is applicable here, not the second one. Therefore, the Bureau erred in ignoring the first case and relying upon the second case.

In the first case decided by the Commission with regard to AT&T's investment in polyethylene shielded video cables ("PSV"), *PSV Cable I*, the Commission found that, "AT&T included PSV with telephone pairs in composite cables as part of its network of permanent, local television distribution facilities in most major U.S. cities."¹² The Commission decided to allow 100 percent recovery for the investment in the PSV cable stating, "Since the composite cables themselves remain used and useful [remain in use] we will not disallow that part of the overall investment allocated to PSV."¹³ The *PSV Cable I* decision applies here, because all Paniolo spare fiber remains available for use, which supports 100 percent cost recovery.

¹² *Common Carrier Rate Structure Inquiry Tariff Investigation*, 88 FCC2d 1656 (Feb. 23, 1982) ("PSV Cable I") at ¶ 48.

¹³ *PSV Cable I* at ¶ 49.

Subsequently, in 1986, AT&T advised the Commission that AT&T was no longer using the PSV cable, and saw no future use for the PSV cable.¹⁴ Based upon the changed circumstances, the Commission decided to permit only 50 percent cost recovery.¹⁵ The *PSV Cable II* (50% recovery) decision does not apply here because SIC has not admitted, NECA has not shown, and the Order does not (and cannot) find that there is no foreseeable use for the spare Paniolo fiber. Thus, *PSV Cable II* is not applicable and there is no basis for the 50 percent award in this case.

When *PSV Cable I* and *PSV Cable II* are read together, it is apparent that *PSV Cable II* provides no basis to deny 100 percent recovery to SIC. Absent the factual finding in *PSV Cable II* of no existing or future use, the Bureau must follow *PSV Cable I* and allow 100 percent recovery for the SIC spare fiber.

Moreover, both *PSV Cable I* and *PSV Cable II* were decided before the adoption of the Part 36 rules that NECA applies to spare fiber.¹⁶ And, of course, the *PSV Cable* cases were decided approximately 20 years before the Guidelines were issued in 2004. In short, there is no rational basis for relying upon cases that predate the rules, the Guidelines, and do not even address the concept of spare fiber. And, even if there were, the Order relies upon an inapposite case (*PSV Cable II*) when there is a sister case (*PSV Cable I*) that is entirely apposite.

¹⁴ In the Matter of Special Access Tariffs of Local Exchange Carriers, 1986 WL 291617 (Jan. 24, 1986) ("PSV Cable II") at ¶ 40.

¹⁵ *PSV Cable II* at ¶ 41. Sometime in the 1960s/1970s AT&T began deploying PSV Cable for video special access transport purposes. The PSV Cable was part of composite cable that also included telephone cable, all sheathed together. As early as 1976 AT&T acknowledged that 58% of the PSV Cable wasn't being used. *PSV Cable I*, ¶ 48. By 1986 AT&T acknowledged that there was no foreseeable use for the PSV cable. *PSV Cable II*, ¶ 40. The FCC found that AT&T continued to install PSV Cable long after it was clear that there were no foreseeable application for it. *PSV Cable II* at ¶ 38).

¹⁶ See 52 FR 17229 (May 6, 1987).

Comsat Case. The Order simply misinterpreted the *Comsat* case.¹⁷ *Comsat* also supports 100 percent recovery for the spare capacity, not 50 percent recovery. First, the Commission noted that in-use, in-orbit satellites routinely contain spare receivers. For example, the INTELSAT IV satellites employed 12 transponders served by four traveling wave tube receivers, each capable of feeding all 12 transponders. Only one was needed for full capacity operations; three were spares.¹⁸ Thus, 75 percent of the receivers on the satellite were spares, analogous to the fact that 68 percent of the fiber installed by carriers is spare, as noted herein. The Commission permitted Comsat to include in the rate base the full investment in the satellites, without even considering reducing the recovery on the basis of spare capacity being included. Thus, ***Comsat stands for the proposition that spare plant related to in-use plant should be 100 percent recovered.***

Second, the Commission noted that Comsat also invested in spare *satellites*, including both on-ground and in-orbit spares. The Commission determined that Comsat was entitled to include 100 percent of the investment in the spare satellites in its rate base, not 50 percent:

Comsat has also included its share of the net investment cost of satellites used as on-ground or in-orbit spares. Comsat states such costs have been included because spare satellites provide customers with greater assurance of continuity of service in the event of a malfunction of on-line equipment. We accept on-ground and in-orbit spares which we have authorized pursuant to Titles II and III of the Communications Act as proper for rate base inclusion.¹⁹

¹⁷ *Communications Satellite Corporation, Investigation Into Charges, Practices, Classifications, Rates, and Regulations*, 56 FCC2d 1101 (1975) ("Comsat").

¹⁸ *Id.* at n. 14.

¹⁹ *Id.* at ¶ 94.

Thus, the *Comsat* case provides no basis to limit the recovery of SIC to 50 percent of the investment in spare fiber. In fact, *Comsat* supports full recovery for spare capacity which, in this case, would result in 100 percent recovery for SIC.

Neither of these cases is apposite here. SIC does not keep or set apart any of the Paniolo fibers for a specific use. Therefore, the *PSV Cable II* and *Comsat* cases provide no basis to treat part of Paniolo as reserve plant rather than spare fiber. As a result, it is apparent that the Bureau's reliance upon these outdated cases is misplaced.

D. No Factual Basis Exists to Deviate from the NECA Spare Fiber Guidelines in Favor of the Paniolo Spare Fiber Rule

Instead of following the Guidelines, the Order adopted the "Paniolo Spare Fiber Rule", a standard that applies only to SIC. The Order begins by asserting that \$1.9 million a year (the amount SIC was previously paying for a short term lease on certain undersea fiber) is a "reasonable application of the threshold 'used and useful' considerations which we ordinarily expect to be sufficient to resolve revenue requirement questions."²⁰ There is no foundation for such analysis, nor does the Order even attempt to explain why other carriers are permitted to pool 100 percent of the costs of their spare fiber.

To reach the decision, that SIC's cost recovery should be limited to 50 percent, the Order determined that the in-use fiber comprises "only a very small portion of the capacity on Paniolo."²¹ This is also without foundation. According to the Harper Declaration, there are [REDACTED] fibers in use [REDACTED] [REDACTED] consistent with the Guidelines. Given that the Order recognizes that constructing 12

²⁰ Order at ¶ 18.

²¹ Order at ¶ 17.

fibers would constitute 98 percent of the cost of Paniolo's 48 fiber cable,

[REDACTED]

The record evidence shows that the cost of including spare fiber is a "relatively small" increment to the total engineering and construction costs.²² There was no dispute as to SIC's estimate that the additional cost of laying 48 fibers rather than 12 was only 2 percent of project costs.²³ The Harper Declaration explains that carriers routinely deploy 48 fibers, including substantial spare fibers, and recover the costs of the fiber deployments from the NECA Pool. He further testifies that in the high cost environment of Hawaii, it was reasonable for SIC to incur the relatively small additional cost to deploy 48 as opposed to some lesser number of fibers, such as 12.

The Order recognizes that fiber deployments are occurring that routinely include spare fiber but, expresses uncertainty as to whether the cost of such fiber deployment is actually recovered through the NECA Pool.²⁴ Any uncertainty on the part of the Bureau in this regard can only be attributed to NECA's failure to introduce the Guidelines into the record, which, as noted above, may be due to a lack of candor. The Harper Declaration attests that, based on Mr. Harper's experience representing numerous carriers in the preparation of NECA cost studies, the cost of fiber deployments, *including spare fiber*, is in fact recovered from the NECA Pool. Mr. Harper further indicates that he is unaware of any other case in which NECA has refused to permit recovery of the cost of spare fiber associated with in-use fiber.

²² Order at ¶ 21.

²³ *Id.* at n.65.

²⁴ Order at ¶ 22 and n.71.

E. The Anticipated Demand Requirement Adopted In the Order Overrules the Guidelines, Changes the Existing Rules, Violates the Prohibition on Retroactive Rulemaking and Will Harm NECA and Other Carriers

The Order finds that all of the factors considered by the Bureau weighed in favor of SIC and of recovery for Paniolo costs, except "anticipated demand" for regulated services.²⁵ This determination on demand reduces SIC's recovery from 100 percent to 50 percent.

[W]e are concerned that Sandwich Isles is unable to quantify any meaningful projected demand for the near-term future. As NECA observes, the 'used and useful' analysis requires that regulated taxpayers realize the benefit from the investment be realized in a useful time. The Commission has flexibility in considering what constitutes a 'reasonable time,' but here we lack meaningful projected demand data both in general, and for particular services.²⁶

In so doing, the Order *creates and imposes upon SIC an entirely new and novel requirement that carriers demonstrate anticipated demand for spare fiber based upon carrier specific evidence of demand for regulated services.*

As to the anticipated demand, the Order is explicit that a general showing of demand is not sufficient; the evidence must be carrier specific.²⁷ And furthermore, a showing of demand for broadband and other advanced services cannot be considered; only demand for regulated services will suffice.²⁸ The Order states that the rules being applied to SIC "apply to everyone."²⁹ *Therefore, the Order means that spare fiber costs cannot be included in the NECA Pool*

²⁵ Compare Order at ¶¶ 19-21 (describing factors that support full recovery, including unique geographic challenges in Hawaii, the special role of Sandwich Isles, and inclusion of spare capacity) with Order at ¶¶ 22-23 (anticipated demand).

²⁶ Order at ¶ 22.

²⁷ Order at n.72 (requiring SIC-specific demand data).

²⁸ *Id.*

²⁹ *Id.* at n.71.

absent a showing of anticipated demand based on carrier specific evidence of demand for regulated services sufficient to absorb the spare fiber.

Under the Guidelines, NECA interpreted Sections 36.152 and 36.153 to mean that spare fiber is to be allocated to the pool on the same basis as the in-use fiber in the same cable, without the newly adopted requirement for a carrier specific showing of anticipated demand for regulated services. Applied uniformly among the states, this new rule would require NECA and/or the FCC to evidence demand characteristics for all small and rural LECs that participate in the NECA Pool (which presumably is between 1100 and 1350). Sections 36.152 and 36.153 contain no reference to an anticipated demand showing. The imposition of such a requirement goes beyond mere interpretation of the rules.

It is well-established that new rules can only apply prospectively.³⁰ The Commission has held that, "By definition, a rule has legal consequences only for the future."³¹ The Commission also has recognized that, "[I]mpermissible retroactivity involves, by definition, the application of a new rule to past occurrences."³² The Commission retains discretion whether to address an issue by rulemaking or by adjudication.³³ Nevertheless, the Supreme Court also held that an administrative agency should be more circumspect than a court in making new law through

³⁰ See, e.g., *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216, 109 S.Ct. 468 (1988).

³¹ See, e.g., *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 23 CR 410, 15 FCC Rcd 25020 (Dec. 13, 2000), ¶ 37; *Assessment and Collection of Regulatory Fees for Fiscal Year 1998* (Apr. 1, 2003), ¶¶ 10-11.

³² See, e.g., *Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures*, 19 FCC Rcd 2551 (Feb. 4, 2004), ¶ 22; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993), ¶¶ 118-121.

³³ *Qwest v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

adjudication because an administrative agency, unlike a court, has the option of using rulemaking.³⁴ Here, the Guidelines rest in part upon the fact that the Commission issued an NPRM in 1997 upon which the Commission took no further action.³⁵ Thus, the Commission recognized that the rules governing spare fiber must be revised through a rulemaking. Accordingly, imposition of the anticipated demand requirement by a declaratory ruling amounts to improper retroactive rulemaking.

NECA has not applied an anticipated demand requirement to other carriers to date, but according to the Order, "the same Commission rules apply to everyone." This cannot be what the Bureau intended.³⁶ On reconsideration, the Bureau should abandon the anticipated demand requirement and require NECA to continue to apply the existing Guidelines and the existing interpretation of Sections 36.152 and 36.153 of the Commission's rules.

II. The Order is Inconsistent with and Fails to Respect the Fundamental Holdings of the Study Area Waiver Orders

Prior Commission decisions authorizing SIC's participation in the NECA Pool ("Study Area Waiver" or "SAW" decisions), are direct binding precedent in this proceeding. The Order fails because its holding is inconsistent with the SAW decisions and implicitly overturns them without foundation to do so.

The SAW decisions answered the question of (i) whether SIC could lawfully exist and provide local exchange service, and (ii) whether SIC's reasonable costs could be placed in the

³⁴ *SEC v. Chenery*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947) ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct....").

³⁵ Guidelines at 1.

³⁶ The anticipated demand analysis would have to be performed on 30 to 70 percent of the \$125 billion in fiber investment that is spare fiber. *Separations NPRM* at 70.

NECA Pool. With regard to the latter, the SAW orders hold that SIC's reasonable costs could be placed in the NECA Pool based upon the same rules and regulations applicable to all other NECA Pool carriers. The Order overturns the SAW decisions. It finds that only slightly more than 50% SIC's Paniolo costs could be recovered through the NECA Pool.

The Order contends that the Bureau was not bound to follow the SAW decisions because, "[t]he public interest analysis in that context was focused more generally on whether the public interest would be served by extending service to [the HHL]...[T]he Bureau did not approve the eventual costs of [SIC's] network for inclusion in the NECA pool."³⁷ The attempt to distinguish the SAW decisions is without legal or factual basis. It is axiomatic that the agency must provide a reasoned basis to reverse course. None is provided here. Accordingly, on reconsideration the Bureau must follow the SAW decisions.

A. SAW I Makes Clear that the Bureau Decided NECA Cost Accounting Issues and Not Broad Policy

In 1998, the Bureau issued a decision that granted SIC waivers of Commission rules in order to enable SIC to receive high cost loop support under the Universal Service Program and to participate in the NECA pools and tariffs.³⁸ *SAW I* was decided by the Accounting and Audits Division of the Bureau. *SAW I* is replete with a detailed discussion of the accounting treatment to be applied to the costs to be incurred by SIC to construct and operate its proposed network.

SAW I begins with a discussion of the high cost loop support program. The Accounting and Audits Division explains in detail the accounting issues confronting the Bureau. First, *SAW*

³⁷ Order at ¶ 10.

³⁸ *Sandwich Isles Communications, Inc.; Petition For Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, 13 FCC Rcd 2407 (Feb. 3, 1998) ("*SAW I*").

I discusses the high cost loop support program.³⁹ Next, *SAW I* explains the waiver of the high costs loop support program sought by SIC:

Sandwich Isles seeks a waiver of Section 36.611 to permit it to receive high cost loop support based on current costs, and to direct NECA to begin making high cost loop support payments to Sandwich Isles immediately. Sandwich Isles proposes to submit to NECA a rolling annualized average of current costs, which would be subject to true-up adjustments quarterly based on actual costs. Sandwich Isles states that this methodology previously has been met with Commission approval. Sandwich Isles states that, although initial high cost loop support payments would be based on projections, the projections would be updated quarterly with actual cost data. Thus, reliance on projected cost data would be diminished, and ultimately high cost loop support payments for the initial year of operation would be based solely on actual cost.⁴⁰

Having identified these specific accounting issues with regard to high cost loop support, the Accounting and Audits Division then made a detailed and specific finding with regard to certain past accounting issues, granting Sandwich Isles a waiver of Section 36.611 of the Commission's rules to the extent necessary to permit it to receive high cost loop support.⁴¹

Next, the Accounting and Audits Division addressed the issue of whether SIC could participate in the NECA tariffs and pools on a going-forward basis. The Division found it to be in the public interest for SIC to put its large capital investments in the NECA Pool:

We also find it reasonable that Sandwich Isles participate in NECA pools and tariffs. Participation in NECA will allow Sandwich Isles to avoid the costs of filing and maintaining its own company-specific interstate tariffs. The cost of preparing company-specific tariffs could be excessive for a company with relatively few customers. In addition, because Sandwich Isles plans to make large capital investments to initiate service, its company-specific rates would likely be extremely high. Therefore, it is in the public interest to permit Sandwich Isles and

³⁹ *Id.* at ¶¶ 2-4.

⁴⁰ *Id.* at ¶ 6 (footnotes omitted).

⁴¹ *Id.* at ¶ 11.

its potential customers to benefit from both the cost savings and lower rates available through NECA participation.⁴²

The Division concluded:

We therefore waive the incumbent LEC requirements of Part 36 and Part 69 of the Commission's rules for Sandwich Isles. This waiver permits Sandwich Isles to become a member of NECA and to participate in NECA pools and tariffs.⁴³

Ironically, the Division noted that NECA fully supported the Bureau's decision:

NECA and NTCA support Sandwich Isles' Petition. NECA states that the methodology proposed by Sandwich Isles is administratively feasible and can be incorporated in NECA's current high cost loop support reporting mechanisms.⁴⁴

In *SAW I*, it is apparent that the Accounting and Audits Division issued a decision that considered and resolved NECA cost accounting issues with regard to SIC. *SAW I* is not a general policy decision. It is a detailed and specific decision with regard to waivers of cost accounting rules.

B. *SAW II* Set the Stage for the Bureau to Decide a Waiver Petition on Equitable Grounds

In *SAW II*, the Commission decided in 2004 that SIC to petition for a waiver of the Commission's study area freeze.⁴⁵ In doing so, the Commission recognized that the *SAW I* decision resolved NECA cost accounting issues, noting that the Accounting and Audits Division granted SIC rule waivers to receive high cost loop support and participate in the NECA tariffs and pools.⁴⁶ The Commission reversed the Bureau in *SAW II* because intervening decisions required new carriers such as SIC to apply for a waiver of the study area waiver freeze in order

⁴² *SAW I* at ¶ 13 (footnotes omitted).

⁴³ *Id.* at ¶ 15.

⁴⁴ *Id.* at ¶ 9 (footnote omitted).

⁴⁵ *GTE Hawaiian Telephone Company, Inc.*, 19 FCC Rcd 22268 (Oct. 29, 2004) ("*SAW II*").

⁴⁶ *Id.* at ¶¶ 1, 4.

to receive high cost loop support and participate in the NECA tariffs and pools. The requirement that SIC seek a waiver set the stage for the Bureau to make an equitable decision in *SAW III*.

The Commission explained that the *purpose of requiring SIC to apply for a waiver was to enable the Bureau to evaluate the new burden on the Universal Service Fund*:

The creation of a new study area has the effect of placing a new burden on the federal universal service fund. By requiring Sandwich Isles to seek a study area waiver, the Commission will have the opportunity to consider whether creating a high-cost study area in Hawaii would have an adverse effect on the universal service fund and whether or not it would serve the public interest.⁴⁷

In undertaking this analysis the Commission was aware of the high cost of providing service to the HHL:

According to USAC's most recent projections Sandwich Isles receives annually, approximately \$5.4 million in high-cost loop support, \$1.5 million in local switching support, and \$ 7 million in interstate common line support. Sandwich Isles serves 1,059 lines and its total high-cost support of almost \$ 13.9 million amounts to more than \$ 13,000 per loop, per year.⁴⁸

Given these high costs, the requirement that SIC apply for a waiver was intended to give the Bureau an opportunity to weigh the costs and benefits of SIC participation in the NECA Pool under an equitable balancing test. In his concurrence, Commissioner Copps noted that the study area waiver petition would be an equitable proceeding, stating, "I can only hope that a fuller record in a subsequent study area waiver proceeding will bring an equitable solution for all."⁴⁹ Thus, *SAW II* set the stage for an equitable decision in *SAW III*.

⁴⁷ *Id.* at ¶ 9.

⁴⁸ *Id.* at n.36.

⁴⁹ *SAW II*, concurring statement of Commissioner Copps.

C. SAW III Fully Considered the Equitable Implications of SIC's High Costs and the Limited Demand for SIC's Services and the Order Identifies No Basis for Departing from SAW III

In *SAW III*, the Bureau applied an equitable balancing analysis based on four factors identified in SIC's waiver request: (1) the unique geographic challenges in Hawaii; (2) the special role of SIC; (3) the inclusion of spare capacity; and (4) the limited demand for service in the HHL.

In particular, *SAW III* weighed the "large amounts of capital" needed to serve the HHL against the relatively small number of access lines:

Sandwich Isles states that it has been steadily investing large amounts of capital to construct state-of-the-art facilities to provide service on the Hawaiian home lands in reliance on the now-reversed Bureau order since 1998. As a result of the combination of \$166 million in capital funding from the Rural Utilities (RUS), and cost recovery through participation in NECA access tariffs and pools, and universal service support, Sandwich Isles states that it has been able to extend service to over 4,000 new lots and almost 1,200 access lines in 20 new communities, and expects to expand service to an additional 14 communities during 2005.⁵⁰

After comparing the large investment with the small number of lines, *SAW III* explicitly recognized the high cost per loop:

According to the Universal Service Administrative Company's (USAC's) most recent projections Sandwich Isles receives annually, approximately \$7.4 million in high-cost loop support, \$1.9 million in local switching support, and \$8 million in interstate common line support. Sandwich Isles serves 1,238 lines and its total high-cost support of almost \$17.3 million amounts to almost \$ 14,000 per loop, per year. Sandwich Isles' total annual support based on these estimates is 0.42 percent of total high-cost support.⁵¹

⁵⁰ *SAW III* at ¶ 11.

⁵¹ *Id.* at n.53.

Having weighed the benefit to the HHL against the burden to the NECA Pool, *SAW III* granted SIC waivers of Commission rules to recover costs from the NECA Pool.⁵² The Bureau granted SIC's waiver request even after considering that the number of SIC's customers at the time (1,200 access lines) had fallen short of the projected number of customers set forth in *SAW I* (4,700 access lines).⁵³

Now, without explanation or justification, the Order clearly reverses *SAW III* by imposing a 50 percent limit on SIC's cost recovery from the NECA Pool that the Bureau did not apply in *SAW III*. The mere fact that the Order claims to be using a different equitable balancing test – the "used and useful" standard⁵⁴ – does not distinguish *SAW III*. In reality, the Order weighs exactly the same four factors that the Bureau considered in *SAW III*.⁵⁵ As to the first and second factors (geographic challenges and SIC's special role), the Order follows *SAW III* and finds they weigh in SIC's favor.⁵⁶ Unfortunately, the Order reverses *SAW III* as to the third and fourth factors (inclusion of spare capacity and limited demand in the HHL).

In so doing, the Order mischaracterizes *SAW III*, asserting that it considered only broad policy issues and not "the eventual costs of Sandwich Isles' network".⁵⁷ As noted above, that conclusion is plainly incorrect. *SAW III*, like *SAW I*, was replete with accounting analysis and considered, in detail, the costs and benefits of permitting SIC to place its costs in the NECA

⁵² *SAW III* at ¶ 28.

⁵³ Compare *SAW I* at ¶ 5 (noting at the time that SIC expected to "provide service to approximately 4,700 customers over the next 5 years") with *SAW III* at ¶ 11 (noting 1,200 access lines).

⁵⁴ Order at ¶ 14.

⁵⁵ Order at ¶¶ 19-23.

⁵⁶ *Id.* at ¶¶ 19 and 20.

⁵⁷ Order at ¶ 10.

Pool. Nevertheless, the Order reversed *SAW III* without justification, thereby placing SIC at risk of default on its RUS loans.

D. Overturning *SAW III* Places SIC at Risk of Default on its RUS Loans

The Order notes that the SIC facilities were being constructed with "capital funding from the Rural Utilities (RUS), and cost recovery through participation in NECA access tariffs."⁵⁸ The Order further notes *that absent participation in the NECA Pool*, SIC would face serious risk of default on its RUS loans:

Sandwich Isles states that denial of its Petition would reduce it to competitive carrier status thereby eliminating most of its interstate access revenue and all of its universal service support, which would result in unaffordable rates in the Hawaiian home lands and create a *serious risk of default on its RUS loans*.⁵⁹

The Order now places SIC at serious risk of default on the Paniolo lease, and in turn its RUS loans, by denying pooling of 50 percent of the costs of Paniolo portion of the HHL network. The excuse for doing so is the inclusion of spare fiber (factor 3) and the lack of demand (factor 4). However, both of these factors were part of the holding in *SAW III* and no basis is shown to reverse the 100 percent recovery permitted in *SAW III*.

Spare Capacity. As to the spare capacity factor, the Order finds that the SIC facilities contain too much capacity, even for 20,000 HHL home sites.⁶⁰ First, there is no foundation for this finding. Second, this finding reverses *SAW III* because *SAW III* approved NECA pooling of the costs of the network as approved by RUS.⁶¹ RUS approved a 48 fiber network and that is what was built. Nowhere does *SAW III* suggest that an equitable solution would be to redesign

⁵⁸ *SAW III* at ¶ 11 (quoted in full above).

⁵⁹ *SAW III* at ¶ 12 (emphasis supplied).

⁶⁰ Order at n.75.

⁶¹ *SAW III* at ¶ 11 (quoted in full above).

the facilities approved by RUS, eliminate spare fiber and reduce the cost of construction and size of the RUS loans. *SAW III* held that the equities weighed in favor of pooling the cost of a 48 fiber network approved by RUS engineers. The Order, in contrast, holds that the equities weigh in favor of pooling only one-half of the cost of a single portion of a 48 fiber network approved by RUS engineers.

The fact that SIC used private funding rather than an RUS loan for the Paniolo portion of the HHL network provides no basis to ignore the *SAW III* precedent.⁶² First, Paniolo built the same facilities approved by RUS, a 48 fiber network. Second, the Paniolo lease cost is not materially different from the RUS loan, the lease is simply a graduated payment schedule [REDACTED]. The point is that the Bureau in *SAW III* approved NECA pooling of the same 48 fiber network and the same annual payment obligation that the Bureau now reduces by 50 percent in the Order. The Order puts SIC at serious risk of default on the Paniolo lease and the RUS loans, the very thing that *SAW III* held the Bureau would not do.

Anticipated demand. The *SAW III* holding cannot be distinguished based upon an alleged failure to show anticipated demand (factor 4 in the Order). The Bureau cannot claim that it was unaware in *SAW III* of the limited number of access lines in the HHL. Indisputably, *SAW III* explicitly considered the limited access lines, as quoted above.⁶³ The same evidence, including the 20,000 person waiting list for HHL home sites, that was accepted as sufficient in *SAW III* is rejected in the Order as insufficient based on mere speculation in the Order that the HHL Commission will not award these home sites at a fast enough pace to satisfy the Bureau.⁶⁴

⁶² Order at n. 79.

⁶³ *SAW III* at ¶ 11 and n.53.

⁶⁴ Order at n.74.

III. Even if the Bureau Had the Right to Apply the "Used and Useful" Standard, It Was Misapplied

Even if the Bureau had discretion to ignore the Guidelines, rule Section 36.153 and the SAW precedent, the Bureau misapplied the "used and useful" standard in the Order. The Order misapplies the standard when it awards only \$1.9 million for the in-use fiber when the record evidence shows, and the Order finds, that the cost of the in-use fiber is 98 percent of the total cost of the Paniolo cable. Even if some basis were shown to treat undersea cable differently from terrestrial cable, the Order misapplies the "used and useful" standard when the Order applies a 50 percent cost recovery limit to the Paniolo 48 fiber terrestrial fiber when for more than ten years NECA has never disputed the inclusion of SIC's 48 fiber terrestrial costs. There is no dispute that 55 percent of the total Paniolo construction costs are terrestrial. *Accordingly, at a minimum SIC should have been awarded 100 percent recovery for the terrestrial component of Paniolo.* Finally, the Order misapplies the "used and useful" standard when the Order purports to engage in an equitable analysis that is manifestly inequitable and exceeds the bounds of Bureau discretion.

A. As to In-use Fiber, No Rational Basis Exists to Award Only \$1.9 Million When In-Use Fiber Comprises 98 Percent of Paniolo Costs

The Order finds that the Paniolo cable is in use, but awards SIC only \$1.9 million, or 13 percent of the Paniolo annual lease cost of \$15 million.⁶⁵ No rational basis is articulated to limit the award to \$1.9 million. The award of \$1.9 million for the in-use fiber contradicts the Bureau's explicit finding in the Order that the cost of construction of the in-use fiber comprises 98 percent of the total cost.⁶⁶ The award of \$1.9 million has no rational basis in a cost analysis, despite the

⁶⁵ Order at ¶ 17 and n.30.

⁶⁶ *Id.* at ¶ 21 and n.65.

fact that the Order decides a NECA cost accounting issue. Fundamentally, the Order decides a cost accounting issue, yet ignores the undisputed cost data that justifies a 98 percent award based on use of the Paniolo cable.

To the extent that the Bureau arrived at the \$1.9 million award for the in-use fiber by a different rationale, namely, the cost of leasing fiber on another cable, the Order also misapplies the "used and useful" standard.⁶⁷ NECA does not require carriers to demonstrate that they could have avoided construction costs by leasing. Even if such a showing were required, the Order ignores the record evidence. SIC showed that prior to committing to the Paniolo lease SIC obtained a price quote of \$9-11 million per year [REDACTED] to lease other undersea cables, costs which do not include terrestrial connectivity.⁶⁸ Against this evidence, NECA offered a low oral price quote obtained after the Paniolo cable was placed into service. That evidence is irrelevant because the "used and useful" analysis must be applied to the information at hand when costs are incurred, not years later.⁶⁹

B. As to the Paniolo Terrestrial Fiber, No Basis Exists to Depart from the Historical 100 Percent Cost Recovery

No basis exists to treat undersea fiber differently than terrestrial under the Guidelines and Section 36.153 of the Commission's rules. However, to the extent that the Bureau finds some basis to treat undersea fiber differently, the Order misapplies the "used and useful" standard because it fails to award 100 percent cost recovery for the Paniolo terrestrial construction costs. NECA has not disputed that SIC's terrestrial network is "used and useful" and for more than 10 years has accepted the costs of the SIC's terrestrial network into the NECA Pool without dispute.

⁶⁷ *Id.* at ¶ 18.

⁶⁸ *See* SIC Comments at 14-15, 18.

⁶⁹ *See id.* at 15.

The Order never mentions the terrestrial part of the Paniolo network and only refers to Paniolo as, "the inter-island submarine cable system."⁷⁰ Perhaps as an oversight, the Order fails find that NECA does not dispute that SIC's 48 fiber terrestrial network is "used and useful" and fails to award 100 percent cost recovery for the Paniolo aspect of SIC's terrestrial network.

The Harper Declaration explains that 55 percent of the Paniolo construction and engineering costs relate to the terrestrial part of the Paniolo network.⁷¹ Mr. Harper supplies copies of accounting information that provides additional detail in support of the 55 percent terrestrial cost allocation.⁷² SIC has provided the cost breakdown to NECA and NECA has not disputed the cost allocation. The terrestrial part of Paniolo was engineered and constructed in the same manner as the SIC terrestrial network backbone, the costs of which have been accepted into the NECA Pool without dispute. Indisputably, therefore, 100 percent of the costs of the terrestrial aspects of Paniolo should have been awarded to SIC in the Order.

C. 50 Percent Cost Recovery Is Inequitable and Unjust

Finally, the Order misapplies the "used and useful" standard because it characterizes the standard as a flexible equitable test but reaches a result that is inequitable and unjust.⁷³ The Order ignores important equitable considerations of reasonable reliance and good faith judgment of a regulated entity. SIC's reasonably relied upon *SAW I* and *SAW III* and SIC exercised reasonable good faith judgment in constructing Paniolo.

Reasonable reliance is an important equitable consideration. Indeed, when the Commission overturned *SAW I*, the Commission acknowledged SIC's dependency upon *SAW I*

⁷⁰ See, e.g., Order at 8.

⁷¹ Harper Declaration at ¶ 31.

⁷² *Id.*, Exhibit C.

⁷³ Order at ¶ 14 and n. 38.

and allowed SIC to continue to receive support during the pendency of *SAW III*.⁷⁴ SIC committed to the Paniolo lease in reliance on *SAW I* and *SAW III*. SIC's reliance was reasonable because the Bureau, specifically the Accounting and Audits Division, granted SIC rule waivers in *SAW I* and *SAW III* for the express purpose of enabling SIC to participate in the NECA tariffs and pools and because Paniolo fiber is the same as the facilities considered in *SAW III*, as explained above. The Order improperly ignored SIC's reasonable reliance on *SAW I* and *SAW III* and therefore is inequitable and unjust.

The Commission has long held that it will respect the good faith judgment of its licensees. The Order ignored SIC's reasonable exercise of its good faith judgment as a carrier. SIC considered alternatives to the Paniolo lease. SIC found it would incur substantial costs to lease capacity on other aging cables.⁷⁵ SIC reasonably determined to commit to the Paniolo lease in order to obtain capacity on a new, reliable cable. SIC reasonably determined that doing so was the most economical and efficient choice over the 20-25 year life of the Paniolo cable.⁷⁶ SIC's reasonable, good faith judgment should have been given considerable weight but is ignored in the Order, thereby rendering the Order inequitable and unjust.

Finally, in light of the *SAW III* decision finding that there was adequate demand from the HHL for SIC to build a 48 fiber network and place the reasonable costs thereof in the NECA Pool, the Order lacked foundation and misapplied the "used and useful" standard when it reduced SIC's recovery for the Paniolo build to 50 percent based upon doubt about whether there really

⁷⁴ *SAW II* at ¶ 10 ("To ensure continued service to Sandwich Isles' customers, we will continue to treat Sandwich Isles as an incumbent LEC for purposes of receiving universal service support until the Commission rules on a request for a study area waiver, provided that Sandwich Isles file such request within 60 days of the effective date of this Order.").


⁷⁵ See SIC Comments at 14-15, 18.

⁷⁶ See SIC White Paper at 6, 12.

was adequate demand in HHL for SIC's network.⁷⁷ The Bureau ignored the waiting list for HHL sites and the 20,000 access lines it represents on the grounds that the HHL Commission is unlikely to award the sites within the 20 -25 year life of the Paniolo fiber.⁷⁸

IV. CONCLUSION

Whereby, for the foregoing reasons SIC respectfully requests that the Bureau reconsider the level of recovery afforded SIC under the Order and provide 100 percent recovery of SIC's Paniolo lease costs from the NECA Pool.

By:  _____

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⁷⁷ Order at ¶ 22 (questioning "how quickly [HHL] residents are likely to arrive").

⁷⁸ The Order also is inequitable because it penalizes SIC for not foreseeing the "great recession" that occurred in the United States after SIC committed to the Paniolo lease in 2007 and that continues to impact the housing market in Hawaii and elsewhere.

EXHIBIT A

HARPER DECLARATION

DECLARATION

I, Ben Harper, hereby declare as follows:

I. Introduction

1. I make this declaration on the date written below for submission to the Federal Communications Commission ("FCC") in connection with the request of Sandwich Isles Communications Inc. ("SIC") for inclusion of the lease and related costs incurred by SIC in connection with the Paniolo cable network ("Paniolo") in the National Exchange Carrier Association ("NECA") traffic sensitive pool ("NECA Pool").

2. I am Vice President at GVNW Consulting, Inc. ("GVNW") and have worked in the telecommunications industry for over 24 years. GVNW specializes in providing accounting and regulatory consulting services to small and mid-sized local exchange carriers ("LECs"), particularly rural LECs. I have been employed by GVNW since 1990. In my capacity with GVNW I prepare cost studies and undertake other accounting matters for a number of rural carriers, almost all of whom participate in the NECA Pool. I have extensive experience working with NECA with regard to inclusion of carrier costs in the NECA Pool. I have represented SIC with regard to its compliance with NECA Pool matters since 1998.

3. I have reviewed the Declaratory Ruling issued by the FCC on September 29, 2010, with regard to the inclusion of Paniolo lease costs in the NECA Pool (the "Order"). The Order finds that an unspecified amount of the costs of Paniolo are not "used and useful" because not all of the Paniolo fiber is currently utilized, and therefore it would be "inappropriate" to include all costs in the NECA Pool. Order, para. 9. As a result, the Order directs NECA to include slightly more than 50 percent of the Paniolo lease costs in

the NECA Pool. Specifically, the Order finds as reasonable for inclusion in the NECA Pool baseline costs of \$1.9 million per year. Order, para. 18. Based upon equitable considerations such as SIC's special role in Hawaii serving the Hawaiian Homelands ("HHL"), the Order also finds that 50 percent of the remaining Paniolo lease costs should be recovered by SIC.

II. Summary of Conclusions

4. *First*, I have been asked whether the Order is consistent with NECA cost allocation rules applicable to all LECs throughout the U.S. regarding how to treat fiber that is not currently in-use ("spare fiber"). I conclude that it is not. I further conclude that at this point in time under the existing NECA cost reporting guidelines SIC is entitled to place 100 percent of its Paniolo costs in the NECA Pool. The reason the Order is inconsistent with NECA's cost reporting guidelines is that the Order simply fails to acknowledge that there are existing rules. The NECA Spare Fiber C&WF Investment Cost Reporting Guidelines ("Guidelines") govern how all LECs are supposed to account for, and recover the cost of, spare fiber. Further, the Order (specifically, at footnote 77) suggests to me that the FCC is unaware that since at least 2004 LECs participating in the NECA Pool have been required by NECA to allocate the cost of spare fiber according to the Guidelines, which NECA advises is based upon the FCC's own rules (in 47 CFR §36.152-153). Based upon §36.153 and the Guidelines, it appears to me that the Order applies a different cost recovery standard to SIC than NECA applies to every other LEC participating in the NECA Pool. I am unable to identify any reason in the Order why a different cost recovery rule would apply to SIC's spare fiber than would apply to the spare fiber of other carriers. Lastly, I am unaware of any situation where the Guidelines have

been supplanted in favor of any other rule, including but not limited to the "used and useful" standard.

5. ***Second***, Paniolo consists of two components: undersea fiber and terrestrial fiber, with the undersea landing point being the demarcation of the two components. SIC's wholly terrestrial network utilizes 48 fiber cable. This is the same fiber that is utilized in the terrestrial component of Paniolo. Since its inception as a new carrier, SIC's terrestrial fiber has been allocated according to the Guidelines. Yet, under the Order the terrestrial component of Paniolo is subject to a different cost recovery standard. Given that the fiber is the same in both cases, the same allocation /cost recovery rules should apply. Therefore, at a minimum it would appear to me that the Guidelines should apply to the terrestrial portion of Paniolo, just as it does to SIC's wholly terrestrial network.

6. ***Third***, the Order discounts the cost recovery for Paniolo by a little less than 50 percent and this appears to be unreasonable. My analysis is as follows: SIC determined that for Paniolo the cost difference between installing a 12 or 48 fiber cable is small (2 percent), as the Order notes in footnote 65. SIC reports to GVNW that SIC is presently using [REDACTED]

[REDACTED] throughout the network. When the FCC last considered the matter of spare fiber through a Notice of Proposed Rulemaking in CC Docket No. 80-286 ("NPRM"), the FCC found that the industry practice is to include about 68 percent spare fiber (NPRM at para. 70). Based upon the FCC's finding of 68 percent spare fiber, an expected initial usage of [REDACTED]. Based upon current usage, SIC thus had a reasonable basis to install 48 fibers. Therefore, it is my conclusion that it was unreasonable to discount the cost recovery by 50 percent.

7. ***Fourth***, the Order improperly discounts recovery for costs relating to Paniolo, including insurance, maintenance, and engineering expenses. Such costs are essential for network operation, attributable to the actual use of Paniolo, and exist regardless of the amount of fiber deployed. Accordingly, it would seem to me that even if the FCC were to find that Paniolo spare fiber was ineligible for full recovery, this would not justify discounting costs that would be incurred regardless of the spare Paniolo fiber.

8. ***Fifth***, for the reasons noted above, the Order appears to introduce a new allocation/cost recovery standard - that of "used and useful." In my reading of the Order, "used and useful" appears to me to be an "I know when I see it" standard. Thus, this standard appears unreasonably vague to me, and therefore arbitrary. As articulated in the Order, I believe it would be problematic for an accountant or accounting professional to reasonably implement this standard.

III. NECA Spare Fiber Cost Rules

9. As noted above, NECA has rules governing the cost treatment of spare fiber. The rules are clear. To my knowledge they are not in dispute or subject to legal challenge. Attached as **Exhibit A** is a copy of the previously referenced Guidelines. It is entitled "**Spare Fiber C&WF Investment Cost Reporting Guidelines**". Note: C&WF refers to "cable and wire facilities."

10. The reason NECA has Guidelines is that in the 1990's carriers began transitioning from copper to fiber. When fiber is laid, multiple individual fibers are deployed and there are always spare fibers. This is due to the fact that fibers are sold in bundles and because of the need to plan for increases in future use. Accordingly, from an

accounting perspective it is necessary for there to be clear and consistent allocation and accounting rules governing how to treat spare fiber in the NECA Pool.

11. The Guidelines are short and self-explanatory. They exist to provide LECs (and consultants such as GVNW) with practical instruction about how to allocate spare fiber in the NECA Pool for cost recovery purposes. Put colloquially, they exist to tell LECs how to recover from the NECA Pool costs associated with spare fibers.

12. Because the Guidelines are intended to be instructive, they include an illustration about how to allocate costs in the NECA Pool for spare fiber. That illustration (at 1& 2) involves a fiber optic cable with 24 fibers, only 8 of which are in-use:

Questions have arisen concerning the proper cost categorization treatment of spare fiber... investment. For example, if a company has a 24 fiber route, and 8 of the fibers are used for interexchange facilities and the other 16 are unused (i.e., 'spares'), how would they be categorized...? [T]he rules and industry practice generally would categorize the spare portion of any facility, including fiber, in the same manner as the in-use portion of the same section of cable. Using 'in-use' facilities as a guideline, the 16 spares in the 24 fiber route from the example...would be allocated in the same proportion as the 8 'in-use' fibers.

13. In short, according to NECA, where fiber optic cable is in-use, "spare fiber plant should continue to be assigned to the same cost pools as related 'in-use' equipment."

Id. at 1. From an accounting perspective these instructions are unambiguous: where a fiber facility is in-use and contains spare fibers, the cost of the spare fiber is allocated in the same manner as the in-use fibers for cost recovery purposes. I am unaware of any instance in which spare fiber has been allocated in any manner other than as specified by the Guidelines.

14. In sum, according to the Guidelines, spare Paniolo fibers are to be accounted for, and included in, the NECA Pool in the same percentage as SIC's in-use fiber.

IV. SIC's Fiber Utilization

15. In my capacity as a representative of SIC for purposes of preparing NECA cost studies, I examined the capacity and use of Paniolo fiber in order to enable GVNW to prepare the cost studies with regard to the Paniolo lease costs in accordance with the NECA rules, including the Guidelines.

16. As noted previously, SIC has advised GVNW that SIC is currently using [REDACTED] throughout Paniolo. SIC has informed GVNW that 100 percent of in-use fibers are used for regulated services (telephone and DSL) that qualify for inclusion in the NECA Pool. [REDACTED]
[REDACTED]
[REDACTED]. The usage is 100 percent regulated service for purposes of the Guidelines.

17. Attached hereto as **Exhibit B** is a diagram illustrating the number of fibers presently in use on the various inter-island segments of the undersea cable.

V. Application of the NECA Spare Fiber Guidelines to SIC

18. Relying upon the Guidelines and SIC's reported use of Paniolo fiber, it is my conclusion that under the Guidelines 100 percent of the cost of the Paniolo fiber is entitled to be included in the NECA Pool.

19. My analysis is as follows. SIC's costs associated with regulated services are to be included in the NECA Pool. As noted above, the in-use fibers are used 100 percent

for regulated services. Under the Guidelines the spare fiber is to be accounted for under the same percentage as the in-use fiber. Therefore, 100 percent of the spare fiber costs also are to be included in the NECA Pool.

20. The Order is inconsistent with the Guidelines and §36.153 of the FCC's rules to the extent that the Order does not permit SIC to include all Paniolo fiber costs in the NECA Pool.

VI. Fiber Construction Cost Analysis

21. I have also been asked to review the Order in connection with the fiber construction cost analysis contained therein. My attention was specifically directed to footnote 65 of the Order which notes that SIC indicated that the cost of construction of the 48 fiber network was only about 2 percent more than the cost of construction of a 12 fiber network. My attention also was directed to footnote 77 of the Order where the FCC expresses uncertainty as to whether the costs of carriers' fiber deployments are being recovered from the NECA Pool.

Industry and NECA Practices

22. I am not an expert in the purchasing of fiber. In my experience as a specialized consultant to the rural LEC industry, however, the most common number of fibers deployed by rural LECS participating in the NECA Pool is 24 or 48 fibers. Some rural carriers deploy 96 fiber cable. Few carriers have deployed 12 fiber cable over the last few years for backbone or transport. It is my understanding that 6 fiber cable is not generally commercially deployed for backbone use and, in fact, may not be commercially available at a reasonable economic cost compared to 12 fiber cable.

23. As noted above, carriers deploy spare fibers for several reasons. First, fiber comes in bundles. Second, the typical life of fiber is (generally speaking) 20-25 years, and a substantial amount of the cost of a fiber deployment is in the engineering and construction. Third, the cost of deploying more rather than less fiber is often minimal. For example, in the case of SIC, I inquired of SIC as to its construction cost analysis and was advised that SIC determined that a 48 fiber deployment would have cost only about 2 percent more than a 12 fiber deployment. This seems reasonable to me given the high cost of construction in Hawaii. It is consistent with my general experience that, when purchasing substantial amounts of fiber, the per-unit cost of increasing the fiber strand count may not be great. When that is the case, best practices require that a carrier evaluate carefully whether it is prudent, under the totality of the circumstances, to include a greater amount of fiber rather than a lesser amount.

Paniolo Fiber Deployment

24. SIC has deployed 48 fiber cable in its wholly terrestrial network backbone. Paniolo utilizes the identical fiber count as used by SIC, both on Paniolo's terrestrial backbone and in its undersea cable. [REDACTED]

[REDACTED], SIC would be expected to deploy a 48 fiber cable.

25. Given that for Paniolo one would expect to construct at a minimum 24 fibers, and that the additional cost of deploying 48 fibers is less than 2 percent of the total cost, I find it reasonable and entirely consistent with industry practice that SIC chose to use a 48 fiber cable. This decision is particularly understandable given the unusually high construction costs in Hawaii. Where construction costs are high, carriers are more likely to

deploy once, not multiple times. Had SIC chosen less than 48 fibers it may have been subject to reasonable criticism that it had failed to use due caution in anticipating future need.

Recovery of Substantially 100 Percent of Paniolo Lease Costs

26. Based on the above, it is my conclusion that, even in the absence of the Guidelines, the engineering and construction costs for Paniolo should be accepted into the NECA Pool and that such costs are only 2 percent more than the cost of deploying a 12 fiber cable.

27. Lastly, I conclude that SIC's construction of a 48 fiber network is entirely consistent with industry practice and that the cost of construction of a 48 fiber network should be fully recovered through the NECA Pool.

VII. Terrestrial Component Of The Paniolo Cable

28. I also was asked to review the Order with regard to comparing the cost allocation and recovery treatment of the Paniolo lease costs as compared to the cost allocation and recovery treatment of the SIC network costs.

SIC's Wholly Terrestrial Fiber

29. NECA has acknowledged the reasonableness of including all of the costs of SIC's wholly terrestrial (48 fiber backbone) network, and those costs have been included in the NECA Pool since inception without dispute. Accordingly, to the extent that Paniolo contains fiber identical to that in SIC's wholly terrestrial network, I can see no basis for treating the same fiber differently based upon the fact that one component is wholly terrestrial and the other was constructed along with an undersea component.

Terrestrial Component of the Paniolo Cable System

30. As noted, Paniolo is comprised of two parts. Part is terrestrial. Part is undersea. The undersea cable was engineered and constructed by companies with special expertise in the area of undersea cables according to plans and specifications submitted to, and approved by, the Rural Utilities Service ("RUS"). The Paniolo terrestrial fiber was engineered and constructed by the same firms that engineered and constructed SIC's wholly terrestrial fiber network according to the plans and specifications submitted to, and approved by, RUS.

31. GVNW is familiar with, and has been involved in, the preparation of the cost accounting for the engineering and construction of the SIC's networks, including Paniolo. With regard to Paniolo, the costs of the undersea cable comprise approximately 45 percent of the total engineering and construction costs and the costs of the terrestrial fiber comprise approximately 55 percent of the total costs. This cost breakdown (45/55) was first provided to NECA no later than September 2009.

32. Attached hereto as **Exhibit C** is data illustrating the breakdown between the undersea and terrestrial components of Paniolo.

33. On a per mile basis, the cost of the undersea portion is lower than the cost of the terrestrial portion of Paniolo. This is true in general and in particular where SIC terrestrial network is built into unusually difficult (volcanic) terrain.

SIC Is Entitled to 100% Recovery of Terrestrial Fiber Costs

34. Given that the terrestrial component of Paniolo is identical in all relevant respects to SIC's wholly-terrestrial network and that NECA has accepted the costs of the SIC wholly-terrestrial network into the NECA Pool without dispute, I conclude that NECA

should have accepted 100 percent of the costs of the terrestrial portion of Paniolo into the NECA Pool. Under the Order, and assuming for arguments sake that there is no dispute about the \$1.9 million baseline established in the Order, the amount due SIC for terrestrial fiber should be \$1.9 million plus 100 percent of 55 percent (terrestrial fiber) of the remaining lease costs.

VIII. Various Costs Relating to Paniolo

35. There are three types of costs associated with the operation of Paniolo: insurance, maintenance, and engineering costs, as set forth below. I was asked to review the Order, specifically footnote 30, with regard to the treatment of these costs to determine whether such expenses are attributable to the actual use of the cable.

36. **Insurance.** The cost of the annual insurance premium is [REDACTED]. The insurance is in place whether or not all or part of Paniolo is used. It is my opinion that under the NECA Guidelines and cost accounting rules, SIC is entitled to 100 percent of the insurance cost.

37. **Maintenance.** [REDACTED]
[REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]. Presently, and previously for 2009, these costs apply to regulated use only. It is my opinion that under the NECA Guidelines and cost accounting rules, SIC is entitled to 100 percent of the maintenance cost.

38. **Engineering Costs.** Engineering costs were incurred from 2002-2009 during the network planning phase. The costs relate to certain engineering performed in conjunction with the RUS loan process, including amounts used to secure essential rights of way and landing rights for both terrestrial and undersea components of Paniolo. Without such work, Paniolo would not have been constructed. The total amount submitted by SIC to the NECA pool is [REDACTED]. This cost is not a recurring cost, [REDACTED] and thus is not affected by the number of fibers. It is my opinion that under the NECA Guidelines and cost accounting rules, SIC is entitled to 100 percent of the engineering costs.

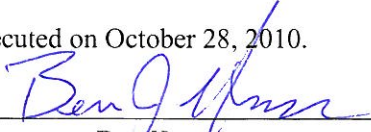
39. It is my opinion that all three of these costs are attributable to the actual use of the cable because such costs are essential to Paniolo's operation, and indeed construction (in the case of the engineering costs). These costs, which are necessary for the provision of regulated services, will be incurred by SIC regardless of whether Paniolo consists of 1, 12 or 48 fibers. As such, it is my opinion that SIC is entitled to 100 percent recovery for expenses under the NECA Guidelines and cost accounting rules.

IX. Implementation of "Used and Useful" Standard

40. The Order identifies "used and useful" as the cost recovery standard that applies to each of the terrestrial and undersea components of Paniolo. The Order does not clarify under what circumstances "used and useful" should apply in lieu of the Guidelines. Also, the Order does not specify a reasonable basis as to why SIC was permitted 50 percent recovery, as opposed to any other percentage (*e.g.*, 30, 40 or 70 percent). For each of these reasons I believe that this cost recovery standard adopted in the Order is ambiguous and/or arbitrary and capricious.

* * * * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct. Executed on October 28, 2010.



Ben Harper

- Exhibit A - NECA's Spare Fiber Guidelines ("Spare Fiber C&WF Investment Cost Reporting Guidelines")
- Exhibit B - Diagram of Paniolo Fiber (Currently Used)
- Exhibit C - Spreadsheets providing the cost breakdown between the undersea and terrestrial components of Paniolo

EXHIBIT A

SPARE FIBER C&WF INVESTMENT

Cost Reporting Guidelines

Issue:

This issue is primarily focused on addressing the provision in the FCC rules to assign facilities to categories that are spare fiber cable and wire facilities (C&WF) plant.¹ Specifically, what is the proper cost categorization treatment of spare fiber C&WF investment, and can spare or “reserved” fiber C&WF investment be categorized based on the intended use of the plant?

Background:

Previously, networks were designed using copper facilities, and the amount of spare capacity engineered into the networks was relatively minor. As the networks and technologies have evolved, the amount of fiber cables being deployed has increased. In addition to carrying more traffic at higher capacities than copper, fiber facilities also tend to have larger amounts of spare capacity.

Questions have arisen concerning the proper cost categorization treatment of spare fiber C&WF investment. For example if a company has a 24 fiber route, and 8 of the fibers are used for interexchange facilities and the other 16 are unused (*i.e.*, “spares”), how would they be categorized?

In addition, there have been questions concerning the proper categorization treatment of “reserved” fiber facilities. Specifically, can reserved facilities, which are defined by FCC’s rules as “kept or set apart for a specific use,”² be categorized based on its intended use?

Analysis:

For the most part, spare fiber plant should continue to be assigned to the same cost pools as related “in-use” equipment. The FCC, in its 1997 *Separations NPRM*, noted, “separations rules generally require carriers to apportion the cost of such facilities among categories on the basis of working network facilities.”³ Thus, if an ILEC assigns 60 percent of the costs of the working facilities in a trunk to the narrowband loop category, 60 percent of the spare facilities in that trunk also is assigned to narrowband loop.”⁴

Recognizing the substantial amount of spare fiber in the network, the FCC sought comment on its proposal to allocate spare fiber investment on “intended use” of the facilities rather than the proportion of working facilities. This concept of allocating spare on the basis of *intended use* was unilaterally objected to by the ILECs in favor of the “in use” method.⁵ To date, the FCC has not taken any further action on its proposal.

¹ For purposes of this paper, “spare” can be defined as unused plant that is placed into operation when other, in-use plant becomes inoperative, or when additional capacity is needed.

² 47 C.F.R. § 36 Appendix-Glossary.

³ See, *e.g.*, 47 C.F.R. § 36.153(a)(1)(i)(B).

⁴ Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 (1997)(*Separations NPRM*) at ¶ 70.

⁵ See, *e.g.*, SBC Comments (“Rather than speculate about the potential uses of spare facilities, the Commission should simply continue the more reliable and prudent practice of apportioning spare facility costs on the basis of working facility costs. ... introducing a forecasting component into the separations process would be unwise.”); USTA Reply (“Spare capacity that is merely intended to meet future demand and/or that is justifiable on cost-reduction grounds should continue to be apportioned on the basis of working facility costs.”); SBC Reply (“Considerations voiced by several commenters support preserving the current “working facilities” approach to assigning spare facility costs, and rejecting any approach based on the “expected use” of such facilities. These considerations demonstrate that the

SPARE FIBER C&WF INVESTMENT

Cost Reporting Guidelines

As a result, the rules and industry practice generally would categorize the spare portion of any facility, including fiber, in the same manner as the in-use portion of the same section of cable. Using “in-use” facilities as a guideline, the 16 spares in the 24 fiber route from the example described in the Background section above would be allocated in the same proportion as the 8 “in-use” fibers.

Further, section 36.153(a) of the FCC’s C&WF categorization rules states “where an entire cable or aerial wire is assignable to one category, its cost and quantity are, where practicable, directly assigned.” This same section of the rules (§ 36.153(a)(1)(i)(A) and (B)) states that the categorization is to be made “from an analysis of cable engineering and assignment records.” These rules apply equally to fiber facilities.

For example, if the spare fiber investment is used wholly in facilities to connect digital loop carriers (DLCs) and subscriber locations, and does not include extended area service (EAS), Host Remote or Special Access circuits, the C&WF investment associated with the spare fiber facility would be directly assigned to Exchange Line C&WF-Category 1. However, if the facilities include circuits that would be applicable to other categories of plant, the investment would not be directly assigned to categories.

Section 36.153 of the FCC’s rules also acknowledges that certain C&WF investment that is “reserved” can be categorized based on an analysis of company records.⁶ To the extent that supportable documentation consistent with the FCC’s rules (e.g., cable engineering and assignment records) identifying the facilities “kept or set apart for a *specific* use” is provided, companies have the ability to separately assign the cost of reserved cable to the various C&WF categories within the boundaries of the FCC’s rules. NECA will require companies to provide support to quantify the investment subject to being categorized based on the “reserved” use, and sufficient documentation to delineate the “specific use” of the reserved plant.

Conclusion:

Based on interpretations of the rules and industry practice, the spare portion of any facility, including fiber, is categorized in the same manner as the in-use portion of the same section of cable. If the spare facility is part of an existing “in use” cable facility, the spare capacity/facilities would get categorized in the same proportion of “in use” categorization (or directly assigned if the entire facility is assignable to one category). To the extent that the facilities have been separately identified and reserved for a specific use, and categorized based on this intended use, supportable documentation will be required to quantify the reserve portion of the C&WF investment and to describe the intended use.

concrete benefits of the former approach far exceed the speculative, uneconomical and administratively complex characteristics of the latter.”); GVNW Comments (“the existing Part 36 and 64 procedures are sufficient to address issues surrounding the allocation of spare facilities”).

⁶ 47 C.F.R. § 36.153(a)(1)(i)(A) (“From an analysis of cable engineering and assignment records, determine in terms of equivalent gauge the number of pairs in use *or reserved* for each category.”) (emphasis added).

§ 36.152 Categories of Cable and Wire Facilities (C&WF). (Cont'd)

(b) Interexchange C&WF - Category 3 - This category includes the C&WF used for message toll and toll private line services. It includes cable and wire facilities carrying intertoll circuits, tributary circuits, the interexchange channel portion of special service circuits, circuits between control terminals and radio stations used for overseas or coastal harbor service, interlocal trunks between offices in the different exchange or metropolitan service areas carrying only message toll traffic and certain tandem trunks which carry principally message toll traffic.

(1) The procedures for apportioning the cost of interexchange cable and wire facilities among the operations are set forth in § 36.156.

(c) Host/Remote Message C&WF - Category 4 - This category includes the cost of message host/ remote location C&WF for which a message circuit switching function is performed at the host central office. It applies to C&WF between host offices and all remote locations. The procedures for apportioning the cost of these facilities among the operations are set forth in § 36.157.

(d) Effective July 1, 2001, through June 30, 2006, study areas subject to price cap regulation, pursuant to § 61.41, shall assign the average balance of Account 2410 to the categories/subcategories, specified in §§36.152(a) through (c), based on the relative percentage assignment of the average balance of Account 2410 to these categories/subcategories during the twelve month period ending December 31, 2000.

§ 36.153 Assignment of Cable and Wire Facilities (C&WF) to categories.

(a) Cable consists of: Aerial cable, underground cable, buried cable, submarine cable, deep sea cable and intrabuilding network cable. Where an entire cable or aerial wire is assignable to one category, its cost and quantity are, where practicable, directly assigned.

(1) *Cable.*

(i) There are two basic methods for assigning the cost of cable to the various categories. Both of them are on the basis of conductor cross section. The methods are as follows:

(A) By section of cable, uniform as to makeup and relative use by categories. From an analysis of cable engineering and assignment records, determine in terms of equivalent gauge the number of pairs in use or reserved for each category. The corresponding percentages of use, or reservation, are applied to the cost of the section of cable, i.e., sheath meters times unit cost per meter, to obtain the cost assignable to each category.

§ 36.153 Assignment of Cable and Wire Facilities (C&WF) to categories. (Cont'd)

(B) By using equivalent pair kilometers, i.e., pair kilometers expressed in terms of equivalent gauge. From an analysis of cable engineering and assignment records, determine the equivalent pair kilometers in use for each category by type of facility, e.g., quadded, paired. The equivalent pair kilometers are then divided by a cable fill factor to obtain the equivalent pair kilometers in plant. The total equivalent pair kilometers in plant assigned to each category is summarized by type of facility, e.g., quadded and paired, and priced at appropriate average unit costs per equivalent pair kilometers in plant. If desired, this study may be made in terms of circuit kilometers rather than physical pair kilometers, with average cost and fill data consistent with the basis of the facilities kilometer count.

(ii) In the assignment of the cost of cable under the two basic methods described in § 36.153(a)(1)(i) consideration is given to the following:

(A) Method (A) described in § 36.153(a)(1)(i)(A) will probably be found more desirable where there is a relatively small amount of cable of variable make-up and use by categories. Conversely, method (B) described in § 36.153(a)(1)(i)(B) will probably be more desirable where there is a large amount of cable of variable make-up and use by categories. However, in some cases a combination of both methods may be desirable.

(B) It will be desirable in some cases to determine the amount assignable to a particular category by deducting from the total the sum of the amounts assigned to all other categories.

(C) For use in the assignment of poles to categories, the equivalent sheath kilometers of aerial cable assigned to each category are determined. For convenience, these quantities are determined in connection with the assignment of cable costs.

(D) Where an entire cable is assignable to one category, its costs and quantity are, where practicable, directly assigned.

(iii) For cables especially arranged for high-frequency transmission such as shielded, disc-insulated and coaxial, recognition is given to the additional costs which are charged to the high-frequency complement.

(2) Cable Loading.

(i) Methods for assigning the cost of loading coils, cases, etc., to categories are comparable with those used in assigning the associated cable to categories. Loading associated with cable which is directly assigned to a given category is also directly assigned. The remaining loading is assigned to categories in either of the following bases:

(A) By an analysis of the use made of the loading facilities where a loading coil case includes coils assignable to more than one category, e.g., in the case of a single gauge uniformly loaded section, the percentage used in the related cable assignment are applicable, or

§ 36.153 Assignment of Cable and Wire Facilities (C&WF) to categories. (Cont'd)

(B) By pricing out each category by determining the pair meters of loaded pairs assigned to each category and multiplying by the unit cost per pair meter of loading by type.

(3) *Other Cable Plant.*

(i) In view of the small amounts involved, the cost of all protected terminals and gas pressure contactor terminals in the toll cable subaccounts is assigned to the appropriate Interexchange Cable & Wire Facilities categories. The cost of all other terminals in the exchange and toll cable subaccounts is assigned to Exchange Cable and Wire Facilities.

(b) *Aerial Wire.*

(1) The cost of wire accounted for as exchange is assigned to the appropriate Exchange Cable & Wire Facilities categories. The cost of wire accounted for as toll, which is used for exchange, is also assigned to the appropriate Exchange Cable & Wire Facilities categories. The cost of the remaining wire accounted for as toll is assigned to the appropriate Interexchange Cable & Wire Facilities categories as described in § 36.156. For companies not maintaining exchange and toll subaccounts, it is necessary to review the plant records and identify wire plant by use. The cost of wire used for providing circuits directly assignable to a category is assigned to that category. The cost of wire used for providing circuit facilities jointly used for exchange and interexchange lines is assigned to categories on the basis of the relative number of circuit kilometers involved.

(c) *Poles and Antenna Supporting Structures.*

(1) In the assignment of these costs, anchors, guys, crossarms, antenna supporting structure, and right-of-way are included with the poles.

(2) *Poles.*

(i) The cost of poles is assigned to categories based on the ratio of the cost of poles to the total cost of aerial wire and aerial cable.

(d) *Conduit Systems.*

(1) The cost of conduit systems is assigned to categories on the basis of the assignment of the cost of underground cable.

EXHIBIT B

PUBLIC VERSION

This document contains privileged and confidential information and has therefore been withheld from the public copy of this document pursuant to Federal Communications Commission Protective Order entered in WC Docket No. 09-133.

EXHIBIT C

PUBLIC VERSION

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